UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB, Intervenor-Plaintiffs, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")

The Government's opposition rehashes arguments made in this and other New Source Review ("NSR") enforcement actions, arguments that have been thoroughly refuted by Detroit Edison's RMRR motion (Doc. No. 116), Detroit Edison's opposition to Plaintiff's motion for partial summary judgment (Doc. No. 127), and the decisions of five district courts. Those courts reviewed the Clean Air Act ("CAA"), the NSR rules, and EPA guidance and conduct for at least two decades. The Government asks the Court to ignore that authority and instead adopt a "*de minimis*" RMRR standard primarily based on two inapplicable and non-binding D.C. Circuit decisions—one that does not even address RMRR, and another that did not address the rules before *this* Court and that the Government elsewhere characterized as "stand[ing] in flagrant opposition to *Chevron*" and "egregiously" wrong. Doc. No. 127 at 5. The Government's claim cannot be squared with the rules and decades of EPA statements and conduct confirming otherwise. Nor can it be squared with EPA's official *Federal Register* statement that it "did *not* consider the terms 'modification' or 'change' to cover everything other than *de minimis* activities." 68 Fed. Reg. 61,248, 61,272 (Oct. 27, 2003) (emphasis added). Detroit Edison's approach is consistent with the majority view on RMRR, and with EPA's view until the Government radically changed it for litigation purposes. Detroit Edison's RMRR Motion should be granted.

ARGUMENT

I. DETROIT EDISON'S APPROACH TO RMRR DOES NOT CREATE A FALSE DICHOTOMY; RATHER, IT COMPORTS WITH THE MAJORITY VIEW.

The Government first claims that Detroit Edison's position creates a "false dichotomy" between an RMRR standard that looks solely at industry practice and one that looks solely at a particular unit. Doc. No. 126 at 2-3. The Government either ignores or misunderstands Detroit Edison's position, which is consistent with the majority view. Doc. No. 116 at 1, 7-16 (discussing cases and RMRR standard). The Government then attempts to distort that view by asserting that RMRR must be assessed by looking at the experience of other "*individual* units throughout

the relevant industry" as opposed to projects throughout the industry. Doc. No. 126 at 6-9 (emphasis in original). This is wrong too. The majority view *requires* consideration of, among other things, *all* five factors as they relate to projects performed across the utility industry *as a whole*. *See, e.g., U.S. v. Duke Energy Corp.*, No. 1:00CV1262, 2010 WL 3023517, at *7 (M.D.N.C. July 28, 2010) ("[T]he Court will consider *all* of the WEPCO factors, including frequency, taking into consideration the work conducted at the particular unit, *the work conducted by others in the industry*, and the work conducted at other individual units within the industry.") (emphasis added). This standard is based largely on EPA's statement that the RMRR inquiry "*must*" be based (*i.e.*, one has *no* discretion in this regard) on experience at "sources" (*not* individual unit or even an individual source) across the relevant "industrial category."[1] The Government's attempt to diminish the significance of this statement should be rejected. *See, e.g., Duke Energy I*, 278 F. Supp. 2d at 632 n.12 (Government's current position on *Federal Register* notice "nonsensical"); *Pa. Dep't of Envtl. Prot. v. Allegheny Energy, Inc.*, No. 05-885, 2008 WL 4960100, at *4-5 (W.D. Pa. Sept. 2, 2008) (*Federal Register* statement "comport[s]" with "EPA's original interpretation of RMRR," not its "narrowed ... interpretation" introduced in "subsequent litigation").

II. NEITHER DECISION FROM THE D.C. CIRCUIT SUPPORTS THE GOVERNMENT'S LITIGATION POSITION.

The Government again focuses on two D.C. Circuit decisions to support its litigation position. Doc. No. 126 at 1-2, 10, 13. But *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), does not discuss the RMRR provision, much less define the types of projects that should

[1] The Government's car analogy proves nothing except to illustrate how its new "individual unit" interpretation of RMRR differs from its original interpretation (Doc. No. 126 at 6-7); in particular, if the question is framed as whether a transmission replacement is "routine" across the automotive repair industry (and, specifically, those that specialize in transmission replacements), the answer is obviously yes. The Government's criticisms of Detroit Edison's purported reliance on "industry-wide tallies" regarding other similar replacements throughout the industry—while invalid—are premature. *Id.* at 5-9. Such criticisms have no bearing on the proper *legal standard* for the RMRR analysis but apply to the weight of the evidence used in *applying* that standard.

qualify as RMRR. As EPA has noted elsewhere, *Alabama Power* "did not have before it the issue of what is a 'change' and did not decide this issue." 68 Fed. Reg. at 61,273. Likewise, *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*"), did not address the rules applicable here but only a revised provision that would have excluded projects costing up to 20% of the replacement cost of an entirely new unit. Though the court vacated the revised provision, it neither endorsed nor adopted the Government's enforcement interpretation it asserts here, *id.* at 888 (we "express no opinion regarding EPA's application of the *de minimis* exception"), a *changed* interpretation EPA could only establish, if at all, '"as [EPA] would formally modify the regulation itself: through the process of notice and comment rulemaking.'" *Duke Energy*, 278 F. Supp. 2d at 637 (quoting *Paralyzed Veterans of Am. v. D.C. Arena*, 326 U.S. App. D.C. 25, 117 F.3d 579, 586 (D.C. Cir. 1997)); *see also U.S. v. Ala. Power Co.*, No. 2:01cv00152-VEH, 2008 WL 7351189, *10 (N.D. Ala. Aug. 14, 2006) ("The United States says that *New York I* and *New York II* ... reject the 'common in the industry' test. *New York I* and *II* don't say that.").

To the extent *New York II* contains *dicta* regarding the court's mistaken understanding of how EPA applied the RMRR provision in the current rules (which were *not* under review in that case), EPA corrected it. EPA's Pet. for Reh'g or Reh'g *En Banc*, *New York v. U.S. EPA*, No. 03-1380, 2006 WL 1547034 (D.C. Cir. May 1, 2006) ("[T]he Panel's statement that the RMRR exclusion is limited to *de minimis* changes ... is in error."). Consistent with that view, EPA has confirmed outside the litigation context "most replacements of existing equipment that are necessary for the safe, efficient, and reliable operation of practically all industrial operations"— replacements like those at issue here—"*are not of regulatory concern and should qualify for the RMRR exclusion.*" 67 Fed. Reg. 80,290, 80,300 (Dec. 31, 2002) (emphasis added). In an NSR case filed in 2000, the Government last week voluntarily dismissed with prejudice 16 claims related to the *same types of projects at issue in this case*, including replacements of economizer,

reheater, and waterwall tubes. *Compare U.S. v. Duke Energy,* No. 1:00CV1262 (M.D.N.C.), Stipulation of Dismissal (filed Aug. 5, 2011) (attached as Ex. 1) *with* Compl. (filed Dec. 22, 2000) (attached as Ex. 2). Like here, the Government initially alleged in that case such projects were non-routine. As the court recently found in *Nat'l Parks Conservation Ass'n, Inc. v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010), those types of projects are routine. *Id.* at *27-34 (finding economizer and reheater replacements RMRR).

III. EPA RADICALLY CHANGED ITS INTERPRETATION OF RMRR.

The Government points to the Seventh Circuit's decision in *WEPCo* and various determinations in support of its view that EPA has always limited the RMRR provision to "*de minimis*" activities. Doc. No. 126 at 2 (claiming that "*de minimis*" standard is "exactly how EPA has interpreted [RMRR] for decades"). Detroit Edison has explained why these materials fail to support the Government's argument. *See* Doc. No. 116 at 4-9; Doc. No. 127 at 4-9. The Court should decline the Government's invitation to reject the very approach EPA took in 1988, defended before the Seventh Circuit in 1990, and confirmed as the standard in the *Federal Register* in 1992. *Id.*; *see also Sierra Club v. TVA*, No. 02-cv-2279-VEH, slip op. at 9 (N.D. Ala. July 5, 2006) ("I do not see how anyone can say with a straight face that EPA's 1999 interpretation of RMRR and emissions ... was the same as [the] published SIP regulations.") (attached as Ex. 3).[2]

Moreover, while the Government continues to rely on inapplicable "applicability determinations," it continues to ignore other EPA statements that *further* contradict its position. *Compare, e.g.*, Doc. No. 126 at 2-4 *with* Doc. No. 127 at 5-11. EPA acknowledged in 2004 that Michigan followed the "routine in the industry" standard, claiming that was "not consistent with [its] policy" as "*recently expressed in utility enforcement actions*." Doc. No. 58-5 at 18 (empha-

[2] The Government's reliance on a 1989 letter sent by a lawyer to EPA is flawed. In addition to being irrelevant and double hearsay, the letter predates EPA's response to the 1990 GAO report and its 1992 clarification of the RMRR standard in the *Federal Register*, which put to rest any concerns about EPA's approach to RMRR following the WEPCo determination.

sis added and parentheses omitted). EPA then asked Michigan to adopt its litigation position and "*discontinue* consideration of the frequency with which other sources in an industry perform similar maintenance, repair or replacement projects." *Id.* at 20 (emphasis added). There is no indication *Michigan* ever did; rather, the facts suggest just the opposite. *U.S. v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1309 (N.D. 2008) (lack of NSR "enforcement ... speaks for itself"). The Government's claim that Detroit Edison's approach would improperly expand RMRR to cover activities "that cannot fairly be considered *de minimis*" is disingenuous. Doc. No. 126 at 1-2. As one court stated it in rejecting a similar argument:

> The United States also says that the [court's] RMRR test is unbounded and will carve out large exemptions from NSR as a threshold matter. The assertion is a bit of a straw man; I didn't write the RMRR rules, nor did I promulgate regulations or guidance saying "routine" was to be judged by whether the parts or equipment has been repaired within the relevant industrial category.

Alabama Power, 2008 WL 7351189, at *10 (N.D. Ala. Aug. 14, 2006). The Government finally argues that the Court should disregard many of EPA's own statements. It states they are not the "stuff ... upon which a coherent permitting regime" can operate but mere "obfuscation." Doc. No. 126 at 17. But this is *precisely* the "stuff" courts rely upon in rejecting the Government's litigation position: "[EPA] could not tell Congress it envisioned very few *future WEPCO*-type enforcement actions on the one hand, and then argue in subsequent enforcement actions that the utility industry was unreasonable in relying on those, or similar, EPA statements." *Alabama Power*, 681 F. Supp. 2d at 1310; *see also Duke Energy I*, 278 F. Supp. 2d at 636 n.13.

CONCLUSION

Detroit Edison's RMRR Motion should be granted.

Respectfully submitted, this 10th day of August 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2011, the foregoing **DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")** was served electronically only on the following attorneys of record in accordance with an agreement reached among the parties:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")

APPENDIX A:
INDEX OF EXHIBITS

Ex. 1 Stipulation of Dismissal of Certain Claims and Defenses, *United States v. Duke Energy Corp.*, No. 00-cv-1262 (M.D.N.C. Aug. 5, 2011)

Ex. 2 Complaint, *United States v. Duke Energy Corp.*, No. 00-cv-1262 (M.D.N.C. Dec. 22, 2000)

Ex. 3 Memorandum Opinion on Sierra Club Motion to Reconsider Stay and Referral to Mediation, *Sierra Club v. TVA*, No. 02-cv-2279-VEH (N.D. Ala. July 5, 2006)

EXHIBIT 1
TO DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP Plaintiff-Intervenors, v. DUKE ENERGY CORPORATION Defendant.	)	Civil Action No. 1:00 CV 1262

STIPULATION OF DISMISSAL OF CERTAIN CLAIMS AND DEFENSES

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff United States, Plaintiff-Intervenors Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group, and Defendant Duke Energy Corp. (the "Parties") hereby submit this Stipulation of Dismissal of Certain Claims and Defenses.

1. The following Claims, only as they pertain to the following projects, are dismissed with prejudice:

Project	**Complaint**
Allen 3 – 1994	Forty-Fifth Claim
Allen 4 – 1996	Fifth Claim
Allen 4 – 1998	Seventh Claim
Allen 5 – 1996	Third Claim

Allen 5 – 2000	First Claim
Belews Creek 1 – 2000	Seventeenth Claim
Belews Creek 2 – 1996	Fifteenth Claim
Belews Creek 2 – 1999	Thirteenth Claim
Buck 6 – 1990	Fifth-Fifth Claim
Cliffside 5 – 1992/1995	Thirty-Ninth Claim
Lee 3 – 1989	Forth-Seventh Claim
Marshall 1 – 1992	Fifty-Seventh Claim
Marshall 2 – 1989	Twenty-Ninth Claim
Marshall 2 – 1996	Thirty-First Claim
Marshall 3 – 1999	Twenty-Seventh Claim
Marshall 4 - 1990	Twenty-Fifth Claim

2. The following Defenses are also dismissed with prejudice:

Defenses set forth in the following paragraphs of Defendant's Answer:
¶ 306 (ultra vires) ¶ 307 (unconstitutional delegation) ¶ 308 (takings) ¶ 312 (Lee permit) ¶ 319 (federal register act) ¶ 320 (congressional review of agency rulemaking) ¶ 323 (notices of violation) ¶ 324 (state sovereignty) ¶ 325 (republican form of government) ¶ 327 (commerce clause)

DATED: August 5, 2011.

Respectfully Submitted,

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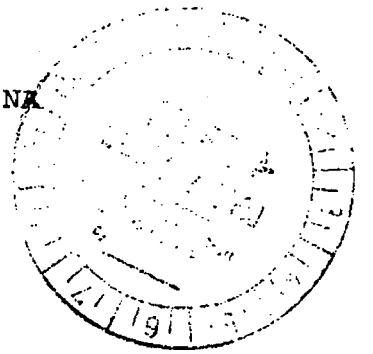
I hereby certify that on August 5, 2011, the foregoing Stipulation was filed electronically using the Court's ECF system and automatically served through the Court's ECF system on counsel of record.

/s/ Jason A. Dunn

Jason A. Dunn

EXHIBIT 2
TO DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No.
DUKE ENERGY CORPORATION,	)	1:00CV01262
Defendant.	)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges:

NATURE OF THE ACTION

1. This is a civil action brought against, DUKE ENERGY CORPORATION ("DUKE" or "the Defendant") pursuant to Sections 113(b) and 167 of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(b)(2) and 7477, for injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. §§ 7470-92. Numerous times, Defendant modified, and thereafter operated, its seven electric generating plants in North Carolina, and one electric generating plant in South Carolina without first obtaining appropriate permits authorizing

construction of modifications at these units and without installing the best available control technology to control emissions of nitrogen oxides, sulfur dioxide, and particulate matter, as the Act requires.

2. As a result of Defendant's operation of the power plants following these unlawful modifications and the absence of appropriate controls, massive amounts of sulfur dioxide, nitrogen oxides, and particulate matter have been, and still are being, released into the atmosphere aggravating air pollution locally and far downwind from this plant. Defendant's violations, alone and in combination with similar violations at other coal-fired electric power plants, have been significant contributors to some of the most severe environmental problems facing the nation today. An order of this Court directing this Defendant, forthwith, to install and operate the best available technology to control these pollutants, in conjunction with orders being sought in similar cases involving other coal-fired electric power plants in the Midwest and Southern United States filed by the United States, will produce an immediate, dramatic improvement in the quality of air breathed by millions of Americans. It will reduce illness, protect lakes and streams from further degradation due to the fallout from acid rain, and allow the environment to restore itself following years, and in some cases decades, of illegal emissions.

3. Sulfur dioxide, nitrogen oxides, and particulate matter when emitted into the air can each have adverse environmental and health impacts. Electric utility plants collectively account for about 70 percent of annual sulfur dioxide emissions and 30 percent of nitrogen oxides emissions in the United States. Sulfur dioxide ("SO_2") interacts in the atmosphere to form sulfate aerosols, which may be transported long distances through the air. Most sulfate aerosols are particles that can be inhaled. In the eastern United States, sulfate aerosols make up about 25 percent of the inhalable particles and, according to recent studies, high levels of sulfate aerosols are associated with increased sickness and mortality from lung disorders, such as asthma and bronchitis. Lowering sulfate aerosol emissions from electric utility plants may significantly reduce the incidence and the severity of asthma and bronchitis and associated hospital admissions and emergency room visits.

4. Nitrogen oxides ("NO_x") are major producers of ground level ozone, which scientists have long recognized as being harmful to human health. NO_x, transformed into ozone, may cause decreases in lung function (especially among children who are active outdoors) and respiratory problems leading to increased hospital admissions and emergency room visits. Ozone may inflame and possibly cause permanent damage to people's lungs. NO_x is also transformed into nitrogen dioxide ("NO_2"), a dangerous

pollutant that can cause people to have difficulty breathing by constricting lower respiratory passages; it may weaken a person's immune system, causing increased susceptibility to pulmonary and other forms of infections. While children and asthmatics are the primary sensitive populations, individuals suffering from bronchitis, emphysema, and other chronic pulmonary diseases have a heightened sensitivity to NO_2 exposure. NO_x also reacts with other pollutants and sunlight to form photochemical smog, which in turn contributes to haze and reduces visibility.

5. SO_2 and NO_x interact in the atmosphere with water and oxygen to form nitric and sulfuric acids, commonly known as acid rain. Acid rain, which also comes in the form of snow or sleet, "acidifies" lakes and streams, making them uninhabitable for aquatic life, and it contributes to damage of trees at high elevations. Acid rain accelerates the decay of building materials and paints, including irreplaceable buildings, statues, and sculptures that are part of our nation's cultural heritage. SO_2 and NO_x gases and their particulate matter derivatives, sulfates and nitrates, contribute to visibility degradation and impact public health. In this civil action, and in other civil actions already filed, the United States intends to reduce dramatically the amount of SO_2 and NO_x that certain electric utility plants have been illegally releasing into the atmosphere. If the injunctive relief requested by the United States is

granted in this case, and in others being filed concurrent with it, many acidified lakes and streams will improve so that they may once again support fish and other forms of aquatic life. Visibility will improve, allowing for increased enjoyment of scenic vistas throughout the eastern half of our country. Stress to our forests from Maine to Georgia will be reduced. Deterioration of our historic buildings and monuments will be slowed. In addition, reductions in SO_2 and NO_x will reduce sulfates, nitrates, and ground level ozone, leading to improvements in public health.

6. Particulate matter is the term for solid or liquid particles found in the air. Smaller particulate matter of a diameter of 10 micrometers or less is referred to as PM 10. Power plants are a major source of particulate matter ("PM"). Breathing PM at concentrations in excess of existing ambient air standards may increase the chances of premature death, damage to lung tissue, cancer, or respiratory disease. The elderly, children, and people with chronic lung disease, influenza, or asthma, tend to be especially sensitive to the effects of PM. PM can also make the effects of acid rain worse, reducing visibility and damaging man-made materials. Reductions in PM illegally released into the atmosphere by the Defendant and others will significantly reduce the serious health and environmental effects caused by PM in our atmosphere.

JURISDICTION AND VENUE

7. This Court has jurisdiction of the subject matter of this action pursuant to Sections 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

8. Venue is proper in this District pursuant to Sections 113(b) of the Act, 42 U.S.C. §§ 7413(b), and 28 U.S.C. §§ 1391(b), (c) and 1395(a), because violations occurred and are occurring in this District, and several of the facilities at issue are operated by Defendant in this District.

NOTICES

9. The United States is providing notice of the commencement of this action to the State of North Carolina and the State of South Carolina as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

10. The 30-day period established in 42 U.S.C. § 7413, between issuance of the Notices of Violation and commencement of a civil action, has elapsed.

THE DEFENDANT

11. Defendant owns and is an operator of nuclear, hydroelectric, and fossil fuel fired electrical generating stations in North Carolina and South Carolina.

12. Defendant is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

STATUTORY BACKGROUND

13. The Clean Air Act is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

The National Ambient Air Quality Standards

14. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for those air pollutants ("criteria pollutants") for which air quality criteria have been issued pursuant to section 108, 42 U.S.C. § 7408. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

15. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an "attainment" area. An area that does not meet the NAAQS is a "nonattainment"

area. An area that cannot be classified due to insufficient data is "unclassifiable."

16. At times relevant to this complaint, Defendant's electrical generating plants were located in an area that had been classified as attainment or unclassifiable for one or more of the following pollutants: NO_x, SO_2, PM 10 and PM.

The Prevention of Significant Deterioration Requirements

17. Part C of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration ("PSD") of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to herein as the "PSD program."

18. Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the construction and operation of a "major emitting facility" in an area designated as attainment or unclassifiable unless a permit has been issued that comports

with the requirements of Section 165, including the requirement that the facility install the best available control technology for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(1) of the Act, 42 U.S.C. § 7479(1), designates fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input and that emit or have the potential to emit one hundred tons per year or more of any pollutant to be "major emitting facilities."

19. Section 169(2)(C) of the Act, 42 U.S.C. § 7479(2)(C), defines "construction" as including "modification" (as defined in Section 111(a) of the Act). "Modification" is defined in Section 111(a) of the Act, 42 U.S.C. § 7411(a), to be "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

ENFORCEMENT PROVISIONS

20. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides that "Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or

prohibition of this subchapter . . . the Administrator may . . . bring a civil action in accordance with subsection (b) of this section . . . ."

21. Section 113(b)(2) of the Act, 42 U.S.C. § 7413(b)(2), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to $25,000 per day of violation for violations occurring on or before January 30, 1997 and $27,500 per day for each such violation occurring after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, requirements of the Act other than those specified in Section 113(b)(1), 42 U.S.C. § 7413(b)(1), including violations of Section 165(a), 42 U.S.C. § 7475(a) and Section 111, 42 U.S.C. § 7411. 22. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief, as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements in Part C of the Act.

23. At all times pertinent to this civil action, Defendant was and is the owner and operator of:

A) the W. S. Lee Plant, located in Anderson County, South Carolina. The Lee Plant operates three coal-fired generating units.

B) the Belews Creek Plant, located in Stokes County, North Carolina. The Belews Creek Plant operates two coal-fired generating units.

C) the Buck Plant, located in Rowan County, North Carolina. The Buck Plant operates four coal-fired generating units.

D) the Cliffside Plant, located in Cleveland County, North Carolina. The Cliffside Plant operates five coal-fired generating units.

E) the Dan River Plant, located in Rockingham County, North Carolina. The Dan River Plant operates three coal-fired generating units.

F) the CG Allen Plant, located in Gaston County, North Carolina. The CG Allen Plant operates five coal-fired generating units.

G) the Marshall Plant, located in Catawba County, North Carolina. The Marshall Plant operates four coal-fired generating units.

H) the Riverbend Plant is located in Gaston County, North Carolina. The Riverbend Plant operates four coal-fired generating units.

24. At all times pertinent to this civil action, each of the Plants listed in Paragraph 23 was a "major emitting facility" and a "major stationary source," within the meaning of the Act for NO_x, SO_2, and PM.

STATE REGULATORY PROVISIONS

North Carolina

25. Pursuant to Part C of the Clean Air Act, the SIP of North Carolina requires that no construction or operation of a major modification to a major stationary source occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21(i), and North Carolina Administrative Code at Title 15A, Chapter 2, Subchapter 2D, Section .0530 (15A NCAC 2D.0530), which was effective on June 1, 1981, and approved by EPA as part of the federally-enforceable North Carolina SIP on February 23, 1982, at 47 Fed. Reg. 7836, and amended on June 18, 1990, at 55 Fed. Reg. 23735, and on February 1, 1996 (61 Fed. Reg. 3584).

26. Pursuant to Part D of the Act, the SIP of North Carolina requires that no construction or operation of a major modification of a major stationary source occur in an area designated as nonattainment without first obtaining a permit under North Carolina Administrative Code at Title 15A, Chapter 2, Subchapter 2D, Section .0531 (15A NCAC 2D.0531) of the North Carolina SIP that was effective on June 1, 1981, and approved by

EPA as part of the North Carolina SIP on July 26, 1982, at 47 Fed. Reg. 32118, as amended on June 18, 1990, at 55 Fed. Reg. 23735, and on August 1, 1997 (62 Fed. Reg. 41277).

27. The SIP of North Carolina requires that no construction, modification or operation of any facility which may result in air pollution shall occur without first obtaining a permit under North Carolina Administrative Code at Title 15A, Chapter 2, Subchapter 2Q, Section .0300 et seq. (15A NCAC 2Q.0300 et seq.). This rule was approved as part of the North Carolina SIP on May 31, 1972 at 37 Fed. Reg. 10892 , and amended on February 1, 1996, at 61 Fed. Reg. 3584.

South Carolina

28. Pursuant to Part C of the Clean Air Act, the SIP of South Carolina requires that no construction or operation of a major modification to a major stationary source occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21(i), and South Carolina Regulation 62.5, Standard No. 7, which is part of the South Carolina SIP that was approved by EPA on February 10, 1982, at 40 Fed Reg. 6017, and amended on October 3, 1989 (54 Fed. Reg. 40662) and most recently amended on August 20, 1997 (62 Fed. Reg. 44219).

29. The South Carolina SIP, DHEC Reg. 62.5 No. 7, § III.A requires a construction permit for all major modifications. The South Carolina SIP, DHEC Reg. 62.5 No. 7, § IV.A, requires a

major plant or major modification to apply the best available control technology to each pollutant subject to regulation under the Act that the major plant emits in significant amounts.

30. The SIP of South Carolina requires that no construction, modification or operation of any facility which may result in air pollution shall occur without first obtaining a permit under South Carolina Regulation 62.1, Section II, which is part of the South Carolina SIP that was approved by EPA on May 31, 1972, at 37 Fed. Reg. 10892, and amended on February 4, 1992, at 57 Fed. Reg. 4158.

FIRST CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 5, 2000 Project)

31. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

32 At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant. These modifications in 2000 consisted of a major boiler and turbine overhaul for Unit No. 5. Defendant constructed additional major modifications to Unit No. 5 at the CG Allen Plant other than those described in this paragraph.

33. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant,

Unit No. 5, as identified in paragraph 32. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Steam Plant, Unit No. 5.

34. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

35. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

SECOND CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 5, 2000 Project)

36. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

37. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 32 as required by 15A NCAC 2Q.0301.

38. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

39. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRD CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 5, 1996 Project)

40. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

41. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant. This project consists of the replacement of the economizer in the superheat and reheat furnaces for Unit No. 5 in 1996. Defendant constructed

additional major modifications to Unit No. 5 at the CG Allen Plant other than those described in this paragraph.

42. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant, Unit No. 5, as identified in paragraph 41. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Steam Plant, Unit No. 5.

43. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

45. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FOURTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 5, 1996 Project)

46. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

47. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 41 as required by 15A NCAC 2Q.0301.

48. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

41. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTH CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 4, 1996 Project)

50. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

51. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant. This major modification in 1996 consists of the replacement of both banks of the economizer and the superheat header and crossover tubing for Unit No. 4. Defendant constructed additional major modifications to Unit No. 4 at the CG Allen Plant other than those described in this paragraph.

52. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant, Unit No. 4, as identified in paragraph 51. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Steam Plant, Unit No. 4.

53. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

54. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation

prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

SIXTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 4, 1996 Project)

55. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

56. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 51 as required by 15A NCAC 2Q.0301.

57. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

58. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

SEVENTH CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 4, 1998

Project)

59. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

60. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant. These modifications in 1998 consisted of a major boiler and turbine overhaul for Unit No. 4. Defendant constructed additional major modifications to Unit No. 4 at the CG Allen Plant other than those described in this paragraph.

61. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant, Unit No. 4, as identified in paragraph 60. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D. 0530 of the North Carolina SIP at the CG Allen Steam Plant, Unit No. 4.

62. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

63. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the

violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

EIGHTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 4, 1998 Project)

64. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

65. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 60 as required by 15A NCAC 2Q.0301.

66. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

67. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

NINTH CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 2, 1988 Project)

68. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

69. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant, Unit No. 2. These modifications in 1988 included replacement and redesign of major components of the boiler. Defendant constructed additional major modifications to Unit No. 2 at the CG Allen Plant other than those described in this paragraph.

70. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant, Unit No. 2, as identified in paragraph 69. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Steam Plant, Unit No. 2.

71. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

72. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TENTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 2, 1988 Project)

73. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

74. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 69 as required by 15A NCAC 2Q.0301.

75. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

76. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation

prior to January 30, 1997, and $27,500 per day for each such violation.

ELEVENTH CLAIM FOR RELIEF

(PSD Violations at CG Allen Steam Plant, Unit No. 1, 1989 Project)

77. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

78. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the CG Allen Plant, Unit No. 1. These modifications in 1989 included, but are not limited to replacement and redesign of major components of the boiler for Unit No. 1. Defendant constructed additional major modifications to Unit No. 1 at the CG Allen Plant other than those described in this paragraph.

79. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Steam Plant, Unit No. 1, as identified in paragraph 78. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Steam Plant, Unit No. 1.

80. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by

an order of this Court, these and similar violations of the Act will continue.

81. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWELFTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 1, 1989 Project)

82. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

83. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 78 as required by 15A NCAC 2Q.0301.

84. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

85. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the

violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTEENTH CLAIM FOR RELIEF

(PSD Violations at Belews Creek Plant, Unit No. 2, 1999 Project)

86. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

87. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Belews Creek, Unit No. 2. These modifications in 1999 included, but are not limited to the replacement and redesign of both banks of the economizer, and replacement of the horizontal reheater. Defendant constructed additional major modifications to Unit No. 2 at the Belews Creek Plant other than those described in this paragraph.

88. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Belews Creek Plant, Unit No. 2, as identified in paragraph 87. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Belews Creek Plant, Unit No. 2.

89. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Belews Creek Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

90. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FOURTEENTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Belews Creek Plant, Unit No. 2, 1999 Project)

91. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

92. Defendant failed to obtain a permit to construct or operate the modifications at the Belews Creek Plant identified in paragraph 87 as required by 15A NCAC 2Q.0301.

93. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Belews Creek Plant. Unless

restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

94. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTEENTH CLAIM FOR RELIEF

(PSD Violations at Belews Creek Plant, Unit No. 2, 1996 Project)

95. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

96. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Belews Creek Plant, Unit No. 2. These modifications in 1996 included, but are not limited to, the redesign and replacement of the pendant reheater section. Defendant constructed additional major modifications to Unit No. 2 at the Belews Creek Plant other than those described in this paragraph.

97. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Belews Creek Plant, Unit No. 2, as identified in paragraph 96. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as

applicable, as required by Rule 2D.0530 of the North Carolina SIP at Belews Creek Plant, Unit No. 2.

98. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Belews Creek Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

99. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

SIXTEENTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Belews Creek Plant, Unit No. 2, 1996 Project)

100. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

101. Defendant failed to obtain a permit to construct or operate the modifications at the Belews Creek Plant identified in paragraph 96 as required by 15A NCAC 2Q.0301.

102. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Belews Creek Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

103. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

SEVENTEENTH CLAIM FOR RELIEF

(PSD Violations at Belews Creek, Unit No. 1, 2000 Project)

104. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

105. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Belews Creek, Unit No. 1. These modifications in 2000 included, but are not limited to: redesigning and replacing both banks of economizers, replacement of the horizontal reheater. Defendant constructed additional major modifications to Belews Creek Plant, Unit No. 1 other than those described in this paragraph.

106. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing

or operating the major modifications at Belews Creek Plant, Unit No. 1, as identified in paragraph 105. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Belews Creek Plant, Unit No. 1.

107. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Belews Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

108. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

EIGHTEENTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Belews Creek Plant, Unit No. 1, 2000 Project)

109. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

110. Defendant failed to obtain a permit to construct or operate the modifications at the Belews Creek Plant identified in paragraph 105 as required by 15A NCAC 2Q.0301.

111 Defendant has violated and continues to violate the Act and the North Carolina SIP at the Belews Creek Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

112. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

NINETEENTH CLAIM FOR RELIEF

(PSD Violations at Buck Plant, Unit No. 5, 1991 Project)

113. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

114. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Buck Plant, Unit No. 5. These modifications, completed in 1991 included redesign and replacement of the pendant heater section, and resulted in the refurbishment of the unit. Defendant constructed additional major modifications to

Unit No. 5 at the Buck Plant other than those described in this paragraph.

115. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Buck Plant, Unit No. 5, as identified in paragraph 114. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Buck Plant, Unit No. 5.

116. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

117. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWENTIETH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Buck Plant, Unit No. 5, 1991 Project)

118. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

119. Defendant failed to obtain a permit to construct or operate the modifications at the Buck Plant identified in paragraph 114 as required by 15A NCAC 2Q.0301.

120. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

121. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

TWENTY-FIRST CLAIM FOR RELIEF

(PSD Violations at Buck Plant, Unit No. 4, 1994 Project)

122. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

123. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Buck Plant, Unit No. 4. These modifications

completed in 1994 resulted in the refurbishment of Unit. Defendant constructed additional major modifications to Unit No. 4 at the Buck Plant other than those described in this paragraph.

124. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at the Buck Plant, Unit No. 4, as identified in paragraph 123. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Buck Plant, Unit No. 4.

125. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

126. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWENTY-SECOND CLAIM FOR RELIEF

(North Carolina SIP General Violations at Buck Plant, Unit No. 4, 1994 Project)

127. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

128. Defendant failed to obtain a permit to construct or operate the modifications at the Buck Plant identified in paragraph 123 as required by 15A NCAC 2Q.0301.

129. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

130. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

TWENTY-THIRD CLAIM FOR RELIEF

(PSD Violations at Buck Plant, Unit No. 3, 1994 Project)

131. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

132. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Buck Plant, Unit No. 3. These modifications

completed in 1994 served to overhaul Unit No. 3, including but not limited to replacement of tubing, and replacement of the backpass with redesigned components. Defendant constructed additional major modifications to Unit No. 3 at the Buck Plant other than those described in this paragraph.

133. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Buck Plant, Unit No. 3, as identified in paragraph 132. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Buck Plant, Unit No. 3.

134. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

135. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil

Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWENTY-FOURTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Buck Plant, Unit No. 3, 1994 Project)

136. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

137. Defendant failed to obtain a permit to construct or operate the modifications at the Buck Plant identified in paragraph 132 as required by 15A NCAC 2Q.0301.

138. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

139. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

TWENTY-FIFTH CLAIM FOR RELIEF

(PSD Violations at Marshall Plant, Unit No. 4, 1990 Project)

140. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

141. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at the Marshall Plant, Unit No. 4. These modifications in 1990 included, but are not limited to, the replacement of horizontal reheater and other boiler components. Defendant constructed additional major modifications to Unit No. 4 at the Marshall Plant other than those described in this paragraph.

142. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Marshall Plant, Unit No. 4 as identified in paragraph 141. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Marshall Plant, Unit No. 4.

143. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

144. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such

violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWENTY-SIXTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Marshall Plant, Unit No. 4, 1990 Project)

145. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

146. Defendant failed to obtain a permit to construct or operate the modifications at the Marshall Plant identified in paragraph 141 as required by 15A NCAC 2Q.0301.

147. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

148. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

TWENTY-SEVENTH CLAIM FOR RELIEF

(PSD Violations at Marshall Plant, Unit No. 3, 1999 Project)

149. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

150. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, Marshall Plant, Unit No. 3. These modifications in 1999 resulted in the refurbishment of Unit No. 3, including but not limited to replacement of reheat assemblies, the ignition system, superheat outlet expansion loops, and superheat platen outlet expansion loops. Defendant constructed additional major modifications to Unit No. 3 at the Marshall Plant other than those described in this paragraph.

151. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Marshall Plant, Unit No. 3 as identified in paragraph 150. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Marshall Plant, Unit No. 3.

152. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Marshall Plant. Unless restrained

by an order of this Court, these and similar violations of the Act will continue.

153. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

TWENTY-EIGHTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Marshall Plant, Unit No. 3, 1999 Project)

154. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

155. Defendant failed to obtain a permit to construct or operate the modifications at the Marshall Plant identified in paragraph 150 as required by 15A NCAC 2Q.0301.

156. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

157. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the

violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

TWENTY-NINTH CLAIM FOR RELIEF

(PSD Violations at Marshall Plant, Unit No. 2, 1989 Project)

158. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

159. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, Marshall Plant, Unit No. 2. These modifications in 1989 included, but are not limited to: replacement of the waterwall, replacement of the lower economizer and other boiler work. Defendant constructed additional major modifications to Marshall Plant, Unit No. 2 other than those described in this paragraph.

160. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Marshall Plant, Unit No. 2 as identified in paragraph 159. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Marshall Plant, Unit No. 2.

161. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530

of the North Carolina SIP at Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

162. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRTIETH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Marshall Plant, Unit No. 2, 1989 Project)

163. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

164. Defendant failed to obtain a permit to construct or operate the modifications at the Marshall Plant identified in paragraph 159 as required by 15A NCAC 2Q.0301.

165. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

166. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTY-FIRST CLAIM FOR RELIEF

(PSD Violations at Marshall Plant, Unit No. 2, 1996 Project)

167. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

168. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Marshall Plant, Unit No. 2. These modifications in 1996 included, but are not limited to replacement of primary superheater convection pass front wall and other work at Unit No. 2. Defendant constructed additional major modifications to Marshall Plant, Unit No. 2 other than those described in this paragraph.

169. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Marshall Plant, Unit No. 2 as identified in paragraph 168. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable,

as required by Rule 2D.0530 of the North Carolina SIP at Marshall Plant, Unit No. 2.

170. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

171. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRTY-SECOND CLAIM FOR RELIEF

(North Carolina SIP General Violations at Marshall Plant, Unit No. 2, 1996 Project)

172. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

173. Defendant failed to obtain a permit to construct or operate the modifications at the Marshall Plant identified in paragraph 168 as required by 15A NCAC 2Q.0301.

174. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

175. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTY-THIRD CLAIM FOR RELIEF

(PSD Violations at Cliffside Plant, Unit No. 2, 1993 Project)

176. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

177. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Cliffside Plant, Unit No. 2. These modifications completed in 1993 resulted in the refurbishment of the unit. Defendant constructed additional major modifications to Unit No. 2 at the Cliffside Plant other than those described in this paragraph.

178. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Cliffside Plant, Unit No.

2 as identified in paragraph 177. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Cliffside Plant, Unit No. 2.

179. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

180. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRTY-FOURTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Cliffside Plant, Unit No. 2, 1993 Project)

181. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

182. Defendant failed to obtain a permit to construct or operate the modifications at the Cliffside Plant identified in paragraph 177 as required by 15A NCAC 2Q.0301.

183. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

184. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTY-FIFTH CLAIM FOR RELIEF

(PSD Violations at Cliffside Plant, Unit No. 3, 1990 Project)

185. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

186. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Cliffside Plant, Unit No. 3. These modifications completed in 1990 resulted in the refurbishment of the unit, including but not limited to replacement of tubes, replacement and redesign of the backpass, and replacement and redesign of the ignition system. Defendant constructed additional major

modifications to Unit No. 3 at the Cliffside Plant other than those described in this paragraph.

187. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Cliffside Plant, Unit No. 3 as identified in paragraph 186. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Cliffside Plant, Unit No. 3.

188. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

189. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRTY-SIXTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Cliffside Plant, Unit No. 3, 1990 Project)

190. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

191. Defendant failed to obtain a permit to construct or operate the modifications at the Cliffside Plant identified in paragraph 186 as required by 15A NCAC 2Q.0301.

192. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

193. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTY-SEVENTH CLAIM FOR RELIEF

(PSD Violations at Cliffside Plant, Unit No. 4, 1990 Project)

194. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

195. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Cliffside Plant, Unit No. 4. These modifications

completed in 1990 resulted in the refurbishment of the unit, including but not limited to replacement of tubing, replacement of upper economizer banks and pendant superheater assemblies, turbine rehabilitation, and a fuel system upgrade. Defendant constructed additional major modifications to Unit No. 4 at the Cliffside Plant other than those described in this paragraph.

196. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Cliffside Plant, Unit No. 4 as identified in paragraph 195. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Cliffside Plant, Unit No. 4.

197. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

198. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil

Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRTY-EIGHTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Cliffside Plant, Unit No. 4, 1990 Project)

199. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

200. Defendant failed to obtain a permit to construct or operate the modifications at the Cliffside Plant identified in paragraph 195 as required by 15A NCAC 2Q.0301.

201. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

202. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

THIRTY-NINTH CLAIM FOR RELIEF

(PSD Violations at Cliffside Plant, Unit No. 5, 1992/1995 Project)

203. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

204. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Cliffside Plant, Unit No. 5. These modifications included the redesign and replacement of the Unit No. 5 economizer, and other work, in 1992 and 1995. Defendant constructed additional major modifications to Unit No. 5 at the Cliffside Plant other than those described in this paragraph.

205. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Cliffside Plant, Unit No. 5 as identified in paragraph 204. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Cliffside Plant, Unit No. 5.

206. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

207. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief

and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FORTIETH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Cliffside Plant, Unit No. 5, 1992/1995 Project)

208. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

209. Defendant failed to obtain a permit to construct or operate the modifications at the Cliffside Plant identified in paragraph 204 as required by 15A NCAC 2Q.0301.

210. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

211. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FORTY-FIRST CLAIM FOR RELIEF

(PSD Violations at Cliffside Plant, Unit No. 1, 1993 Project)

212. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

213. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Cliffside Plant, Unit No. 1. These modifications were completed in 1993 and resulted in the refurbishment of the unit, including but not limited to replacement of economizer banks, replacement of the burner panels, and replacement of pendant reheater tubes. Defendant constructed additional major modifications to Unit No. 1 at the Cliffside Plant other than those described in this paragraph.

214. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Cliffside Plant, Unit No. 1 as identified in paragraph 213. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Cliffside Plant, Unit No. 1.

215. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Cliffside Plant. Unless restrained

by an order of this Court, these and similar violations of the Act will continue.

216. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FORTY-SECOND CLAIM FOR RELIEF

(North Carolina SIP General Violations at Cliffside Plant, Unit No. 1, 1993 Project)

217. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

218. Defendant failed to obtain a permit to construct or operate the modifications at the Cliffside Plant identified in paragraph 213 as required by 15A NCAC 2Q.0301.

219. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Cliffside Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

220. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the

violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FORTY-THIRD CLAIM FOR RELIEF

(PSD Violations at Dan River Plant, Unit No. 3, 1988 Project)

221. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

222. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Dan River Plant, Unit No. 3. These modifications were completed in 1988 and resulted in the refurbishment of the unit, including but not limited to replacement and redesign of tubing, replacement and redesign of the backpass, and replacement of the boiler ignition system. Defendant constructed additional major modifications to Unit No. 3 at the Dan River Plant other than those described in this paragraph.

223. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Dan River Plant, Unit No. 3 as identified in paragraph 222. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Dan River Plant, Unit No. 3.

224. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at Dan River Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

225. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FORTY-FOURTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Dan River Plant, Unit No. 3)

226. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

227. Defendant failed to obtain a permit to construct or operate the modifications at the Dan River Plant identified in paragraph 222 as required by 15A NCAC 2Q.0301.

228. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Dan River Plant. Unless

restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

229. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FORTY-FIFTH CLAIM FOR RELIEF

(PSD Violations at CG Allen Plant, Unit No. 3, 1994 Project)

230. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

231. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at CG Allen Plant, Unit No. 3. These modifications in 1994 included, but are not limited to: replacement of pendant superheater assemblies, replacement of cross-over tubes with two steam lines, and installation of a redesigned superheat header. Defendant constructed additional major modifications to Unit No. 3 at the CG Allen Plant other than those described in this paragraph.

232. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at CG Allen Plant, Unit No.

3 as identified in paragraph 231. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at CG Allen Plant, Unit No. 3.

233. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

234. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FORTY-SIXTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at CG Allen Plant, Unit No. 3, 1994 Project)

235. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

236. Defendant failed to obtain a permit to construct or operate the modifications at the CG Allen Plant identified in paragraph 231 as required by 15A NCAC 2Q.0301.

237. Defendant has violated and continues to violate the Act and the North Carolina SIP at the CG Allen Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

238. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FORTY-SEVENTH CLAIM FOR RELIEF

(PSD Violations at W.S. Lee, Unit No. 3, 1989-90 Project)

239. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

240. At various times, Defendant commenced construction of major modifications, as defined in the Act and the South Carolina SIP, at W.S. Lee, Unit No. 3. These modifications were completed in 1990 and resulted in the refurbishment of the unit, including but not limited to removal and redesign of the platen superheater, replacement of waterwall tubes, replacement of reheat elements, superheat cross over tubes, and of the

economizer. Defendant constructed additional major modifications to Unit No. 3 at the W.S. Lee Plant other than those described in this paragraph.

241. Defendant did not obtain a PSD permit as required by DHEC Reg. 62.5 No. 7, § III of the South Carolina SIP prior to constructing or operating the major modifications at W.S. Lee, Unit No. 3 as identified in paragraph 240. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by DHEC Reg. 62.5 No. 7, § IV of the South Carolina SIP at W.S. Lee, Unit No. 3.

242. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule DHEC Reg. 62.5 No. 7, §III of the South Carolina SIP at W.S. Lee Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

243. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FORTY-EIGHTH CLAIM FOR RELIEF

South Carolina SIP General Violations at W.S. Lee Plant, Unit No. 3, 1989-90 Project)

244. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

245. Defendant failed to obtain a permit to construct or operate the modifications at the W.S. Lee Plant identified in paragraph 240 as required by South Carolina Regulation 62.1, Section II.

246. Defendant has violated and continue to violate the Act and the South Carolina SIP at the W.S. Lee Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the South Carolina SIP will continue.

247. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FORTY-NINTH CLAIM FOR RELIEF

(PSD Violations at Riverbend Plant, Unit No. 4, 1990 Project)

248. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

249. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina

SIP, at Riverbend Plant, Unit No. 4. These modifications were completed in 1990 and resulted in the refurbishment of the unit, including but not limited to replacement or refurbishment of the steam drum, economizer, waterwalls, superheater, and reheater. Defendant constructed additional major modifications to Unit No. 4 at the Riverbend Plant other than those described in this paragraph.

250. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Riverbend Plant, Unit No. 4 as identified in paragraph 249. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Riverbend Plant, Unit No. 4.

251. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Riverbend Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

252. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such

violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTIETH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Riverbend Plant, Unit No. 4, 1990 Project)

253. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

254. Defendant failed to obtain a permit to construct or operate the modifications at the Riverbend Plant identified in paragraph 249 as required by 15A NCAC 2Q.0301.

255. Defendant has violated and continue to violate the Act and the North Carolina SIP at the Riverbend Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

256. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTY-FIRST CLAIM FOR RELIEF

(PSD Violations at Riverbend Plant, Unit No. 6, 1991 Project

257. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

258. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Riverbend Plant, Unit No. 6. These modifications were completed in 1991 and resulted in the refurbishment of the unit, including but not limited to replacement or redesign of the economizer, waterwall, superheater, and reheater. Defendant constructed additional major modifications to Unit No. 6 at the Riverbend Plant other than those described in this paragraph.

259. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Riverbend Plant, Unit No. 6 as identified in paragraph 258. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Riverbend Plant, Unit No. 6.

260. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Riverbend Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

261. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTY-SECOND CLAIM FOR RELIEF

(North Carolina SIP General Violations at Riverbend Plant, Unit No. 6, 1991 Project)

262. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

263. Defendant failed to obtain a permit to construct or operate the modifications at the Riverbend Plant identified in paragraph 258 as required by 15A NCAC 2Q.0301.

264. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Riverbend Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

265. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation

prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTY-THIRD CLAIM FOR RELIEF

(PSD Violations at Riverbend Plant, Unit No. 7, 1992 Project)

266. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

267. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Riverbend Plant, Unit No. 7. These modifications were completed in 1992 and resulted in the refurbishment of the unit, including but not limited to replacement or redesign of the economizer, waterwall, superheater, and reheater. Defendant constructed additional major modifications to Unit No. 7 at the Riverbend Plant other than those described in this paragraph.

268. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Riverbend Plant, Unit No. 7 as identified in paragraph 267. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Riverbend Plant, Unit No. 7.

269. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Riverbend Plant. Unless

restrained by an order of this Court, these and similar violations of the Act will continue.

270. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTY-FOURTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Riverbend Plant, Unit No. 7, 1992 Project)

271. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

272. Defendant failed to obtain a permit to construct or operate the modifications at the Riverbend Plant identified in paragraph 267 as required by 15A NCAC 2Q.0301.

273. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Riverbend Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

274. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the

violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTY-FIFTH CLAIM FOR RELIEF

(PSD Violations at Buck Plant, Unit 6, 1990 Project)

275. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

276. At various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Buck Plant, Unit No. 6. These modifications were completed in 1990 and resulted in the rehabilitation of the unit, including but not limited to replacement of the reheater pendants, superheat and reheat crossover tubes, replacement of crossover supports, and waterwall tubes. Defendant constructed additional major modifications to Unit No. 6 at the Buck Plant other than those described in this paragraph.

277. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Buck Plant, Unit No. 6 as identified in paragraph 276. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Buck Plant, Unit No. 6.

278. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Buck Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

279. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTY-SIXTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Buck Plant, Unit No. 6, 1990 Project)

280. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

281. Defendant failed to obtain a permit to construct or operate the modifications at the Buck Plant identified in paragraph 276 as required by 15A NCAC 2Q.0301.

282. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Buck Plant. Unless

restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

283. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

FIFTY-SEVENTH CLAIM FOR RELIEF

(PSD Violations at Marshall Plant, Unit No. 1, 1992 Project)

284. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

285. at various times, Defendant commenced construction of major modifications, as defined in the Act and the North Carolina SIP, at Marshall Plant, Unit No. 1. These modifications in 1992 included, but are not limited to: replacement of all superheater front steam cooled wall tubes, replacement of the lower economizer bank, replacement of significant portions of the waterwall, and replacement of the oil ignition system. Defendant constructed additional major modifications to Unit No. 1 at the Marshall Plant other than those described in this paragraph.

286. Defendant did not obtain a PSD permit as required by 15A NCAC 2D.0530 of the North Carolina SIP prior to constructing or operating the major modifications at Marshall Plant, Unit No.

1 as identified in paragraph 285. Defendant has not installed and operated BACT for control of NO_x, SO_2, and PM, as applicable, as required by Rule 2D.0530 of the North Carolina SIP at Marshall Plant, Unit No. 1.

287. Defendant has violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and Rule 2D.0530 of the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

288. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTY-EIGHTH CLAIM FOR RELIEF

(North Carolina SIP General Violations at Marshall Plant, Unit No. 1, 1992 Project)

289. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

290. Defendant failed to obtain a permit to construct or operate the modifications at the Marshall Plant identified in paragraph 285 as required by 15A NCAC 2Q.0301.

291. Defendant has violated and continues to violate the Act and the North Carolina SIP at the Marshall Plant. Unless restrained by an order of this Court, these and similar violations of the Act and the North Carolina SIP will continue.

292. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413 (b) and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendant to injunctive relief and civil penalties of up to $25,000 per day for each violation prior to January 30, 1997, and $27,500 per day for each such violation.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations contained in paragraphs 1 through 292 above, the United States of America requests that this Court:

1. Permanently enjoin the Defendant from operating the coal fired plants set out in Paragraph 23 of this Complaint, including the construction of future modifications, except in accordance with the Clean Air Act and any applicable regulatory requirements;

2. Order Defendant to remedy its past violations by, among other things, requiring Defendant to install, as appropriate, the best available control technology at its plants, for each pollutant subject to regulation under the Clean Air Act;

3. Order Defendant to apply for a permit that is in conformity with the requirements of the PSD program;

4. Order Defendant to conduct audits of its operations to determine if any additional modifications have occurred which would require it to meet the requirements of PSD and NSPS and report the results of these audits to the United States;

5. Order defendant to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above;

6. Assess a civil penalty against Defendant of up to $25,000 per day for each violation of the Clean Air Act and applicable regulations which occurred or before January 30, 1997, and $27,500 per day for each such violation after January 30, 1997;

7. Award Plaintiff its costs of this action; and,

8. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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Dated: December 22, 2000

OF COUNSEL:

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EXHIBIT 3
TO DEFENDANTS' REPLY IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT" ("RMRR")

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

SIERRA CLUB and ALABAMA ENVIRONMENTAL COUNCIL, INC.,	)	
Plaintiffs	)	
v.	)	**No. CV-02-2279-VEH**
TENNESSEE VALLEY AUTHORITY,	)	
Defendant	)	

MEMORANDUM OPINION ON SIERRA CLUB MOTION TO RECONSIDER STAY AND REFERRAL TO MEDIATION

I. Background and Current Posture

This is a civil action filed by the Plaintiffs Sierra Club and Alabama Environmental Council, Inc. ("AEC")[1] against the Defendant Tennessee Valley Authority ("TVA") for declaratory and injunctive relief and the imposition of civil penalties under the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA", "the Act"). The action also sought an order penalizing and enjoining TVA's excessive emission of harmful air pollutants from the TVA Fossil Plant in Tuscumbia, Colbert County, Alabama ("Colbert Plant") in violation of the CAA, the Alabama State

[1] Unless the context indicates otherwise, plaintiffs will collectively be referred to as "Sierra Club".

Implementation Plan ("SIP"), 40 C.F.R. § 52.69 *et seq.* and previously at 40 C.F.R. § 52.50 *et seq.*, and the TVA Colbert Plant's Air Permits, 701-0010-Z009; 701-0010-Z013. The Complaint alleged a Count of violation of the CAA each time the Colbert plant's exceeded the twenty per cent opacity limits on the Colbert plant's emissions.

In *Sierra Club v. TVA*, 430 F.3d 1337 (11th Cir. 2005) (doc. 90), the Court of Appeals affirmed the use of continuous opacity monitoring system ("COMS") as credible evidence of opacity violations, reversed my ruling that the Alabama Department of Environmental Management's ("ADEM") use of the "2% de minimis" rule[2] was a permissible interpretation of the CAA, and affirmed Judge Johnson's ruling that TVA was immune from civil penalties under the CAA . The action was remanded to me for proceedings consistent with the Court's opinion.

The parties dispute how many opacity violations would be proven using COMS data. I will have more to say about opacity violations later, but for purposes of this opinion suffice it to say that, in the words of the Court of Appeals, there should be "plenty".

By Orders entered May 23, 2006 (docs. 111, 112, & 113), I stayed this action, ordered the parties into mediation, and denied all outstanding motions as moot, granting the parties leave to seek permission to file new and updated motions should

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[2] Ala. Admin. Code r. 335-3-4-.01(4).

I lift the stay. The motions pending on May 23 were the parties' 2003 motions for summary judgment pending at the time the case was appealed to the Eleventh Circuit, and motions to strike various evidentiary filings and declarations in connection with Sierra Club's renewed Motion for Summary Judgment (which incorporated its 2003 motion).

The Order Referring Action To Mediation ("Mediation Order") directed the parties to notify the court's courtroom deputy, on or before June 9, 2006, of the mediator selected and the time, date and place of the initial mediation sessions. (Doc. 112).

On May 26, 2006, Sierra Club moved for reconsideration of the Mediation Order (doc. 112) and the Stay Order (doc. 111). (Doc. 114). On May 30, 2006, I issued my standard motion response Order giving TVA eleven (11) days to respond to Sierra Club's motion to reconsider. TVA filed its response on June 12, 2006. (Doc. 115). Sierra Club filed a Reply on June 14, 2006.

In this Opinion, I review Sierra Club's Motion to Reconsider, TVA's Response, and the issues I see arising, directly and indirectly. While I have no love for reconsideration motions and ultimately deny Sierra Club relief, the pleadings and my review of the file convince me that further explanation of my views on the current status of the action and its resolution may assist the parties in reaching a resolution.

If not, they can better prepare for trial.

II. The Mediation Order; Rule To Show Cause

Apparently lost on the parties in the latest round of pleadings is that no one obeyed that part of the Mediation Order requiring the naming of a mediator and the furnishing of the information about the initial mediation session by June 9, 2006. Perhaps Sierra Club believed that the filing of a Motion For Reconsideration automatically stays the effect of an Order; it does not. Perhaps Sierra Club and TVA believed that my May 30 standard motion response Order modified the Mediation Order because it permitted TVA's Response to be filed after June 9, 2006; the May 30 Order said nothing about the June 9, 2006 deadline. By Order entered separately, I am directing the parties to either provide the information required by the Mediation Order to my courtroom deputy, in a joint filing signed by counsel for all parties, by 4:00 p.m. Thursday, July 13, 2006, or to appear before me at 4:00 p.m. Friday, July 14, 2006, to show cause, if they can, why they should not be held in contempt for their failure to abide by the applicable terms of the Mediation Order.

III. Sierra Club's Motion To Reconsider; TVA's Response

A. Sierra Club seeks reconsideration because it says (further) mediation will

be futile[3]; because the pendency of the *Duke Energy*[4] appeal does not warrant a stay; seeks leave to file an updated motion for summary judgment; and, in the alternative, if I don't reconsider and withdraw the Mediation and Stay Orders, requests me to certify, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal addressing the rulings in those Orders. (Doc. 114)

B. TVA's response says that the parties have yet to mediate in person as required by this District's ADR plan (a point that Sierra Club's response does not contest) and that Sierra Club has failed, as a matter of law, to establish good cause for vacating the Mediation Order.

C. TVA says I should not reconsider the stay Order because it would be moot if the mediation were successful, and, should the mediation fail, I was correct when I said that the Supreme Court's decision in *Duke Energy* is likely to be binding or informative. (Doc. 113, emphasis in original).

D. TVA says I should deny Sierra Club's request to file an immediate, updated motion for summary judgment.

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[3] Sierra Club says there have been two (2) appellate telephone mediations between the parties, and neither was successful. One of those mediations was conducted through the Eleventh Circuit during the appeal of this action, the second by the Sixth Circuit (05-6329) during an appeal that is still pending.

[4] *U.S. v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005), *certiorari granted by Environmental Defense v. Duke Energy Corp., ____ S.Ct. ____, 2006 WL 1310699, 74 USLW 3407 (U.S. May 15, 2006) (No. 05-848).*

E. TVA says interlocutory appeal would not be appropriate under the instant facts and law.

I discuss each contention, although not in the exact order above.

IV. Discussion

1. The Mediation Order - I have little doubt that the Mediation Order was well within my discretion and it would be inappropriate to certify that Order. *E.g., Abele v. Hernando County*, 161 Fed.Appx. 809 (11th Cir. 2005).

2. Interlocutory Appeal - I believe this is the worst thing I could do. First of all, the Orders in docs. 111 and 112 are not, in my view, appropriate 28 U.S.C. § 1292(b) Orders. The Mediation Order is clearly discretionary, and the question of whether *Duke Energy* warrants a stay of this action is not a controlling question of law, it's a question of timing. Sierra Club misses the mark on timing for a number of reasons. First, the stay is not indefinite; at this point it's less than a year at most, i.e., the end of the Supreme Court's October, 2006 term. Second, there is no guarantee that the Eleventh Circuit would accept the 28 U.S.C. § 1292(b) appeal and, even if it did, that it would resolve such appeal any faster than the Supreme Court will resolve *Duke Energy*. Finally, if the Court of Appeals took the appeal and ordered me to lift the stay based on *Duke Energy*, that would still leave the stay based on mediation in full force and effect, another reason I doubt the Eleventh Circuit would

agree to hear a 28 U.S.C. § 1292(b) appeal of the Mediation and Stay Orders. In short, certifying either of both of the Orders would reactivate the war of pleadings the parties have waged since 2003 instead of making them sit down face to face and see if they can use their powers of persuasion and advocacy to settle, rather than prolong, this litigation.

3. The effect of *Duke Energy* - While I continue to believe *Duke Energy* is likely to affect the operations of TVA's Colbert Plant, I also think, after further consideration, that Sierra Club is probably correct when it says that *Duke Energy* is unlikely to be dispositive of this action, and that the facts of this action are sufficiently different from *Duke Energy's* that any impact will be limited. *Duke Energy* is most likely to affect Colbert Unit 5, which is the subject of a related CAA (modification without proper permitting) case involving these parties, *National Parks Conservation Association & Sierra Club v. TVA*, cv-01-403-VEH (the "*NPCA*" action), currently on appeal to the Eleventh Circuit. *Duke Energy* is less likely to affect Colbert Units 1 - 4, which are not involved in the *NPCA* action.

It is certainly possible that the Supreme Court will decide only the first question on which *certiorari* was granted, i.e., whether the Fourth Circuit's decision in *Duke Energy* invalidated the 1980 Prevention of Significant Deterioration ("PSD") regulations in violation of 42 U.S.C. § 7607(b), which reserves challenges to CAA

regulations having nationwide impact to the D.C. Circuit exclusively. I expressed my views about this issue most recently in the Mediation Order, noting, *inter alia*, that the D.C. Circuit was aware of, cited to, and declined to express an opinion on, the key regulatory issue decided by the Fourth Circuit in *Duke Energy*, which was whether the definition of "modification" was the same in both the CAA's New Source Performance Standards ("NSPS"), 42 U.S.C. §§ 7411, 7411(a) and the Prevention of Significant Deterioration ("PSD"), provisions, 42 U.S.C. §§ 7470 - 7492. *NY v. EPA I*, 413 F.3D 3, 19 - 20.[5]

And Sierra Club should temper any enthusiasm about *Duke Energy's* potential outcome with the thought that getting what you wish for can be problematic: even should the Supreme Court vacate the Fourth Circuit's opinion, it is speculation to say that doing so would somehow limit the Eleventh Circuit's power over the ultimate resolution of this action, particularly with respect to any injunctive relief Sierra Club may, or may not, be awarded. And it would be even more speculative to suggest that, should Sierra Club be unhappy with the ultimate litigation outcome here, the Supreme Court would grant *certiorari* and overturn that outcome.

It is axiomatic that how the Supreme Court frames the issues(s) will in no small

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[5] PSD review of new and modified sources is called "New Source Review", or "NSR", *NY v. EPA I*, 413 F.3d at 12 -13.

part determine the *Duke Energy* analysis, and therefore the outcome. I stand by my *Alabama Power* observations that, regardless of what the law is (or may be by the time *Duke Energy* permeates down to me) it is singularly unwise, under any standard of administrative deference, to say grace over the retroactive agency interpretation of regulations affecting a huge, nationally regulated industry where the new interpretation will result in the expenditures, collectively, of billions of dollars trying to retrofit work that wasn't designed to meet the standards now being imposed. It may be, how do I say it, expedient from a regulatory point of view, but I view *Mead* in part as the judiciary's response to the "that was then, this is now" approach to such regulation. I do not see how anyone can say with a straight face that EPA's 1999 interpretation of RMRR and emissions, as set out in *Alabama Power* and the other 1999 EPA enforcement actions, one being *Duke Energy*, was the same interpretation as ADEM's published SIP regulations.[6] Even if the example given is inaccurate (the Alabama Administrative Code does not tell me how long 335-3-1.02(mm)2.(I) - (ii) has been in effect), there is more than sufficient documentation in the filed exhibits that leads one to conclude that, under the 1999 enforcement theory, EPA deliberately failed to enforce the Act for almost two (2) decades, with all the state environmental

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[6] *See, e.g.*, Ala. Admin. Code r. 335-3-1.02(mm)2.(I) - (ii) (changes in production rate or an increase in the hours of operation shall not be considered a change in the method of operation as set out in the definition of "modification" found at Ala. Admin. Code r. 335-3-1.02(oo)).

agencies and national environmental groups standing idly by while the industry spent billions on "life extension" projects that EPA and the state attorneys general now say were modifications that required permitting. *NPCA* is a good example; TVA's intention to spend hundreds of millions of dollars on Colbert 5 was widely reported in the media, and well known to EPA, ADEM, Sierra Club, *et al.* Twenty (20) years passed before Sierra Club attacked the work as a violation of the Act. If the plaintiffs' positions in *NPCA* and *Alabama Power* are examples of how the CAA is supposed to work, all I can say is that it's a heck of a way to run a railroad.[7]

4. New/"Updated" Motions for Summary Judgment - I believe the parties, if they want to, can successfully resolve this action, in mediation or independent of mediation. Having said that, I have no wish to further delay my role in the resolution of this action. I believe another round of summary judgment motions will do just that.

In order to explain the basis for my belief, I first have to modify something I have said previously, which is that all that remains before me in this action is the

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[7] I say this with some awareness that the United States, the various state attorneys general and *amici* in the remaining 1999 enforcement actions, e.g. *U.S. v. Cinergy*, 384 F.Supp2d 1272 (S.D. Ind. 2005), Case No. 06-1224 (argued June 2, 2006, 7th Cir.) and Petitioner and its *amici* in *Duke Energy, supra*, strongly disagree with my assessment of the 1999 enforcement actions as set out in *Alabama Power, NPCA*, and here, as well as my analysis in those actions of how emissions are to be measured, and what constitutes routine maintenance, replacement and repair ("RMRR"), under the CAA.

question of remedies. The Court of Appeals was clear: the COMS data constitute "credible evidence" of violations of the 20% opacity provisions of TVA's permit. What I have in effect said since, which is broader than what the Court of Appeals said, is that opacity violations, standing alone, mean that TVA has violated the Act, and what's left for trial is appropriate injunctive relief. That may be the ultimate outcome, but further review of Eleventh Circuit jurisprudence, the Alabama State Implementation Plan ("SIP") regulations, and TVA's Colbert permit, leads me to modify my assertion as follows: the COMS data are credible evidence of violations of the 20% opacity provisions of TVA's CAA permit, and therefore make out a *prima facie* violation of the Act.

The reasons that the 20% opacity violations do not, standing alone, end the liability inquiry, can be seen in *Sierra Club v. Georgia Power Co.*, 443 F.3rd 1346 (11th Cir. 2006) ("*Georgia Power*"), decided March 30, 2006. There, the District Court, in a case arising from Georgia Power's Wansley's coal-fired electricity generating plant[8], did what Sierra Club urges me to do now: using COMS data that showed opacity limitation violations, the court granted partial summary judgment on Counts One and Two against Georgia Power, holding that the COMS data showed violations of the Georgia State Implementation Plan ("SIP") and Georgia Power's

[8] Colbert is a coal-fired electricity generating plant.

permit for the Wansley plant . Georgia Power, like TVA here, did not dispute the COMS data, but did contend that the emissions exceedances were not CAA violations because all of them occurred during periods of startup, shutdown, or malfunction ("SSM"). The permit and the Georgia SIP allowed opacity to exceed the (40%) limitation during SSM. The district court concluded that even if the violations occurred during SSM, Georgia Power could not raise an SSM defense. Because Georgia Power conceded that the exceedances took place, the district court's rejection of Georgia Power's ability to raise SSM defenses led the court to grant partial summary in Sierra Club's favor. *Georgia Power*, 443 F.3d 1346, 1352. The district court, at Georgia Power's request, certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Court of Appeals granted Georgia Power's petition for leave to appeal the partial summary judgment order and reversed. In doing so, the Court rejected various Sierra Club arguments (Georgia's SSM rule was broader than EPA 1999 SSM Guidance; the SSM defense only applied to government, not citizen suit, enforcement actions, and SSM applicability was a matter of discretion with the Georgia Environmental Protection Division[9]) and held that, on remand, Georgia Power should be allowed to raise an SSM affirmative defense to the exceedances alleged by Sierra

[9] Georgia's ADEM.

Club. The Court further held that the burden was on Georgia Power to prove, as to all such exceedances, that each met the criteria set forth in Georgia's SSM Rule and the Wansley Plant's SSM condition. *Id.* at 1357.

There are two sets of TVA Colbert Plant CAA Permits before me. The first was issued in 1991, the second in 1998. Sierra Club Motion for Summary Judgment, Exhibit 6., TVA Motion for Summary Judgment, Exhibit 6. Based on the Court of Appeals opinion here, the second set of permits, Permit No. 7-1-0010-Z009 - 13, covering Colbert Units 1 - 5 respectively ("the Colbert permit"), applies since COMS data were not credible evidence until after 1998.

Section 7.a. of the Colbert permit prohibits average and maximum excess emissions over 20% computed from six-minute averages. Section 9. provides exceptions to the opacity requirements: startup (9.a.), shutdown (9.b.), and load change (9.c.).[10]

There are other, potentially applicable, Alabama SIP provisions that TVA could seek to raise in defense of the opacity violations. Ala. Admin. Code r. 335-3-4-.01, Visible Emissions, sets forth at (1)(a) the 20% opacity standard, provides in (1)(b) for a 40% opacity discharge "[d]uring one six (6) minute period in any sixty

[10] "Shutdown" and "Startup" are defined terms, AL Admin. Code r. 335-3-1.02(lll), (ttt); "load change" is not.

(60) minute period"[11], sets forth at (1)(c) the startup, shutdown, load change, "and rate change or other short, intermittent periods of time upon terms approved by the Director and made part of such permit", and, at (1)(d), allows ADEM's director to approve other exceptions in accordance with the provisions of (d) 1. - 5.[12]

The above discussion, like *Georgia Power*, suggest that, as part of its affirmative defense to the opacity violations, i.e., as a way of proving that such violations do not violate TVA's (Title V) permit, the Alabama SIP, and the CAA, TVA may choose to offer evidence as to the opacity violation(s). Should TVA decide to do so I strongly suggest that the parties explore the facts as to proof in detail during mediation if for no other reason than that, should mediation fail, I will require a very detailed and succinct summary of the opacity violations and which ones are, and are not, subject to any such defense(s). Put another way, I do not intend to hear lengthy testimony about matters that reasonable people can stipulate to, and I expect the parties to be reasonable.[13] And, to assist the parties in their efforts to be reasonable,

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[11] Which is not the same as saying, as TVA does, that ". . . Alabama law permits plumes of up to 40% opacity for over two hours every day". TVA Brief In Opposition to Plaintiffs' Renewed Motion For Summary Judgment. (Doc. 93 at 20).

[12] Ala. Admin. Code r. 335-3-4-.01 also contains, at (4), the 2 % "de minimis" standard rejected by the Court of Appeals.

[13] I am aware that such a "case by case" defense of the opacity violations would contradict TVA's writing to Sierra Club that "TVA does not intend to undertake such a one-by-one examination of the appropriate exemption classification of each alleged violation and does not intend to present such one-by-one evidence to the Court in defense of the Plaintiffs' claim for

I do not accept TVA's interpretation of Ala. Admin. Code r. 335-3-4.01(1)(b) "six minutes in any sixty (60) minute period" opacity exceedance. I count sixty minutes from the time of the first violation; if ADEM and EPA had meant to say "every hour", the regulation would say "every hour". Thus, in the case of an opacity exceedance fifty-nine (59) minutes after another exceedance, the second exceedance would be an opacity violation.

Further, I have substantial reservations that, as TVA asserts, an opacity violation does not "count" unless and until that violation is reconciled with or adjusted to the older Method 9 methodology. The Court of Appeals didn't say this, and the literal language of the credible evidence rule does not require it. Ala. Admin. Code r. 335-3-1.-.13. TVA is free to argue that I should not rely on the COMS data, standing alone or otherwise, to support a finding that Sierra Club has carried its burden of proof to show CAA violations; the evidence proffered will ultimately

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injunctive relief." June 6, 2003 letter from Lancaster to Moore, Exhibit 21, Volume II to Plaintiffs' Exhibits in Support of Motion for Summary Judgment. (Doc. 25). That letter was written two (2) years before the initial Eleventh Circuit decision in this action and nearly three (3) years before the Court's *Georgia Power* decision. I consider those decisions, taken together, as sufficiently changing the legal landscape that, should mediation fail, I would permit TVA to undertake such a one-by-one defense, should it be so advised, and subject to the limitations set forth above, i.e., that I will not permit either party to offer "dueling experts" on any/each such opacity violation. If the parties are unreasonable and cannot stipulate as set out above, I will use a Special Master or appoint an independent expert as the court's witness to accomplish this task, and I will assess the costs thereof proportionately against the party(ies) I find to have been unreasonable.

control my decision. TVA is free to preserve for the record its argument that the COMS data must be reconciled or adjusted to Method 9 methodology; I reject that argument.

Having said this, I also advise the parties, particularly the Plaintiffs, that proving the opacity violations may not, as they requested in their motion for summary judgment, automatically lead to an Order directing TVA to submit a plan to correct those violations and prevent their recurrence. That may happen, but TVA, as it requests in its Brief in Opposition to Plaintiffs Renewed Motion For Summary Judgment (doc. 93), is entitled to a hearing where the court will hear, **briefly and succinctly**, evidence on the various factors affecting the issuance and content of any injunction herein.

Finally, I am constrained from suggesting the person(s) the parties may select as their mediator but cannot refrain from observing that, given the technical subject matter involved, it would make a lot of sense to select a mediator who, in addition to possessing substantial mediation skills and experience, "gets it" when it comes to the technical and engineering issues.

A separate Order will issue.

ENTERED this the 5th day of July, 2006.

VIRGINIA EMERSON HOPKINS
United States District Judge